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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

VICKY LEWIS and GARY LEWIS, Individually, As Parents, as Next Friends, and as Administrators of the Estate of Kathryn C. Lewis,
Petitioners,
v.
BRUNSWICK CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Amici will address the following question:

Whether an agency position set forth in a letter and not promulgated pursuant to the notice and comment procedures of APA § 553 has the force and effect of law so as to preempt state law.

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INTEREST OF THE *AMICI CURIAE* [1]

Amici, organizations whose members include state, county, and municipal governments and officials

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[1] The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been

throughout the United States, have a compelling interest in legal issues that affect state and local governments. This case involves an issue at the core of *amici*'s interests: whether federal agency positions arrived at by means falling short of notice and comment rulemaking under § 553 of the Administrative Procedure Act have the force and effect of law so as to preempt state law.

The protection of their citizens' health, safety and welfare is one of the principal exercises by the States of their historic police powers. *See Hillsborough County, Fla. v. Automated Med. Laboratories, Inc.*, 471 U.S. 707, 719 (1985). While the Supremacy Clause unquestionably mandates the preemption of state law in certain circumstances, the Supremacy Clause does not contemplate that federal agency positions not arrived at through the notice and comment procedures of the APA—with their guarantees of public participation, political accountability, and judicial review—be given state law displacing weight by the courts. For this reason, the court of appeals erred in holding that the Coast Guard's position on propeller guards, set forth in a letter that was not promulgated through APA § 553 procedures, has the force and effect of law sufficient to preempt state tort law.

Because of the importance of this issue to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of this case.

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filed with the Clerk of the Court. Pursuant to Rule 37.3 of the Rules of this Court, *amici* state that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than the *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

STATEMENT

A. The Federal Boat Safety Act and Promulgation of Federal Boat Safety Regulations

Congress enacted the Federal Boat Safety Act (FBSA) of 1971, Pub. L. No. 92-75, 85 Stat. 213 (1971), to establish "a coordinated national boating safety program involving both the Federal Government and the States." S. Rep. No. 248, 92d Cong., 1st Sess. (1971), *reprinted in* 1971 U.S.C.C.A.N. 1333 ("Senate Report"). Congress intended, among other goals, "to improve boating safety by requiring manufacturers to provide safer boats and boating equipment to the public through compliance with safety standards to be promulgated by the Secretary of the Department in which the Coast Guard is operating." *Id.* at 1333.

Congress revised and recodified the FBSA in 1983 as part of a comprehensive revision and recodification of the maritime laws. Pub. L. No. 98-89, 97 Stat. 500, (1983); *see* H.R. Rep. No. 338, 98th Cong., 1st Sess. (1983), *reprinted in* 1983 U.S.C.C.A.N. 924 ("House Report"). It restated the provisions of the FBSA that apply to "the establishment of national construction and performance standards for recreational vessels and their associated equipment" in Chapter 43 of Title 46 of the United States Code. House Report at 158, 1983 U.S.C.C.A.N. at 970. Although Congress made some substantive changes when it revised the maritime laws, it did not significantly alter the provisions of the FBSA at issue in this case. *See* House Report at 117, 120, 158-62, 1983 U.S.C.C.A.N. at 929, 932, 970-74.

The FBSA authorizes the Secretary of Transportation to "prescribe regulations . . . establishing mini-

mum safety standards for recreational vessels and associated equipment." 46 U.S.C. § 4302(a)(1). The FBSA also provides that "[i]n prescribing regulations the Secretary shall, among other things . . . consult with the National Boating Safety Advisory Council [NBSAC]" about three specific regulatory considerations.[2] *Id.* § 4302(c)(4); *see id.* § 4302 (c)(1)-(3).

Congress intended that the regulations prescribed by the Secretary would establish uniform national safety standards. *See* Senate Report, 1971 U.S.C.C.A.N. at 1335. Congress also intended that the Secretary would employ the notice and comment rulemaking procedures of the Administrative Procedure Act (APA) to promulgate regulations establishing national standards, that these regulations would be subject to judicial review as provided in the APA, and that consultation with the National Boating Safety Advisory Council would be an addition to, and not an alternative to, compliance with the APA.

The Senate Report on the FBSA expressly notes that:

> In addition to the specific procedural requirements outlined in the bill, the Secretary, in promulgating standards, is required to comply with the informal rulemaking procedures of the Administrative Procedure Act (5 U.S.C. 553).

Senate Report, 1971 U.S.C.C.A.N. at 1340. Congress further intended that "[a]ny person who believes

[2] As currently organized, the NBSAC has twenty-one members, including seven state officials, seven representatives of boating manufacturers, and seven representatives of national recreational boating associations and the general public. *See* 46 U.S.C. § 13110.

himself to be adversely affected by the promulgation of a standard may obtain judicial review in accordance with the Administrative Procedure Act." *Id.* Congress also noted some specific responsibilities of the Secretary in adopting regulations under the informal notice and comment procedures of the APA:

> The Secretary is expected to maintain in public files the information and comments received or relied upon in carrying out the consideration and consultation [with the National Boating Safety Advisory Council] required by section 6 [now 46 U.S.C. § 4302] and in complying with the rulemaking provisions of the Administrative Procedure Act. The information in these files is to serve as the basis for the required findings as to reasonableness, meeting the need for boating safety and, where applicable, of the necessity for an early effective date, or the necessity for the alteration of existing vessels.

Id.

The Secretary of Transportation has delegated his rulemaking power under the FBSA to the Commandant of the Coast Guard, 49 C.F.R. § 1.46(n)(1), and the Coast Guard has prescribed extensive safety regulations governing recreational boats and associated equipment. 33 C.F.R. Pt. 183 (1997). The Coast Guard, as Congress intended, adopted these regulations pursuant to the notice and comment rulemaking procedures of the APA, 5 U.S.C. § 553. *See* 33 C.F.R. § 183.701 *et seq.* (Subpart L—Start-In Gear Protection) (1997); 46 Fed. Reg. 3515 (1981) (Final Rule); 45 Fed. Reg. 18987 (1980) (Notice of Proposed Rulemaking). The Coast Guard published these regulations in the Federal Register as required by the APA, 5 U.S.C. § 552(a)(1)(D), § 553(d), and it codified them in the Code of Federal Regula-

tions, which "contain[s] each Federal regulation of general applicability and legal effect." 1 C.F.R. § 8.1(a) (1997); *see also* 44 U.S.C. § 1510.

The FBSA expressly preempts a state law or regulation that is not identical to a "regulation prescribed" thereunder. Congress provided that:

> [A] State . . . may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment . . . that is not identical to a regulation prescribed under section 4302 . . . .

46 U.S.C. § 4306. Congress also enacted a savings clause in the FBSA and provided that:

> Compliance with [the FBSA] or standards, regulations, or orders prescribed under [the FBSA] does not relieve a person from liability at common law or under State law.

46 U.S.C. § 4311(g).

B. The Coast Guard's Decision To Accept the Recommendation of the National Boating Safety Advisory Council To "Take No Regulatory Action To Require Propeller Guards"

The Coast Guard did not initiate a notice and comment rulemaking under the APA to "consider, review and assess available data concerning the nature and incidence of recreational boating accidents in which persons in the water are struck by propellers" and to examine the "[f]easibility of some form of mechanical guard or other action to prevent such contact." *See* National Boating Safety Advisory Council, Report of the Propeller Guard Subcommittee, J.A. at 46. Instead, the Coast Guard assigned this responsibility to the NBSAC, which in turn appointed

a five-person subcommittee to address these issues. *Id.* The subcommittee recommended that "[t]he U.S. Coast Guard should take no regulatory action to require propeller guards." *Id.* at 73. Subsequently, the NBSAC voted unanimously "to accept the report [and to] adopt the recommendations of the subcommittee." Minutes of the 44th Meeting of the National Boating Safety Advisory Council, J.A. at 138.

On February 1, 1990, the Chief of the Coast Guard's Office of Navigation Safety and Waterway Services, Rear Admiral Robert T. Nelson, wrote a letter to A. Newell Garden, Chairman of the NBSAC. Admiral Nelson reported that "[w]e have completed our review of the 'Report of the Propeller Guard Subcommittee' " and that "[a]ll of the report's recommendations are accepted." J.A. at 163. Admiral Nelson specifically accepted the subcommittee's recommendation as approved by the NBSAC that "[t]he U.S. Coast Guard should take no regulatory action to require propeller guards." *Id.* He set forth as follows the Coast Guard position on this recommendation:

> Available propeller guard accident data do not support imposition of a regulation requiring propeller guards on motorboats. Regulatory action is also limited by the many questions about whether a universally acceptable propeller guard is available or technically feasible in all modes of boat operation. Additionally, the question of retrofitting millions of boats would certainly be a major economic consideration.

Id. Admiral Nelson stated, however, that "the Coast Guard will continue to collect and analyze data for changes and trends" and "review and retain any information made available regarding development

and testing of new propeller guard devices or other information on the state of the art." *Id.* The Coast Guard did not publish Admiral Nelson's letter in the Federal Register.

The district court granted Brunswick's motion for summary judgment. The court of appeals affirmed, holding that common law claims based on Brunswick's failure to equip an engine with a propeller guard are impliedly preempted because those claims "conflict with the Coast Guard's position that propeller guards should not be required." Pet. App. 23a. The court of appeals held that the Coast Guard's "position rejecting a propeller guard requirement takes on the character of a ruling that no such requirement may be imposed," and "[t]hat position impliedly preempts state law requirements of propeller guards, even in the form of common law claims." *Id.* at 24a.

SUMMARY OF ARGUMENT

Brunswick's claim that the Coast Guard's position on propeller guards preempts state tort law founders on the shoals of a fatal defect: the Coast Guard did not employ the notice and comment rulemaking procedures required by Congress in the Administrative Procedure Act and the Federal Boat Safety Act that are necessary to give its position the force and effect of law.

The court of appeals' holding—that an agency's position in a letter adopting the recommendations of an advisory committee preempts state law—is inconsistent with this Court's recognition that only "properly promulgated, substantive agency regulations have the 'force and effect of law' " necessary "to pre-empt state law under the Supremacy Clause." *Chrysler*

Corp. v. Brown, 441 U.S. 281, 295-96 (1979) (citations omitted). As applied by the court of appeals to preempt the Lewises' tort claims against Brunswick, the Coast Guard's "position" on propeller guards is in effect a "substantive rule or 'legislative-type rule' " because it " 'affect[s] individual rights and obligations.' " *Id.* at 302 (citations omitted). A "substantive rule," however, "must conform with any procedural requirements imposed by Congress" in order to have the force and effect of law. *Id.* at 303. Congress requires agencies to develop "legislative rules"—rules that have the same binding effect as statutes—through the public notice and comment procedures of the Administrative Procedure Act, 5 U.S.C. § 553. *Chrysler v. Brown*, 441 U.S. at 312-16.

The Coast Guard did not comply with the APA's rulemaking procedures: it did not publish notice of a proposed rulemaking in the Federal Register, afford interested persons an opportunity to comment on the letter, or publish a final rule incorporating " 'a concise general statement' " of the rule's " 'basis and purpose.' " *See Lincoln v. Vigil*, 508 U.S. 182, 195-96 (1993) (quoting 5 U.S.C. § 553). The Coast Guard's failure to comply strictly with the APA "precludes courts from affording [the letter] the force and effect of law." *Chrysler v. Brown*, 441 U.S. at 312. Because the Coast Guard letter plainly does not have the force and effect of law, it cannot preempt state law. Respect for the role of the States in the federal system and for the principle of politically accountable agency decisionmaking are further reasons to reaffirm the fundamental requirement that an agency cannot promulgate a rule with the force and effect of law necessary to preempt state law unless it complies with the

notice and comment rulemaking procedures of the APA.

ARGUMENT

THE COAST GUARD'S "POSITION" ON PROPELLER GUARDS DOES NOT HAVE THE FORCE AND EFFECT OF LAW AND CANNOT PREEMPT STATE LAW

The determination whether federal law preempts state law is a question of congressional purpose. *See, e.g., New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). The FBSA, by its terms, preempts only a state "law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment . . . that is not identical to a regulation prescribed under section 4302 [of the Act]." 46 U.S.C. § 4306.

In this case, there is no regulation prescribed under section 4302 that has the force and effect of law necessary to trigger preemption. Unlike the numerous instances in which the Coast Guard intended to preempt state law, *see* 33 C.F.R. Part 183, in this case the Coast Guard did not comply with the procedural requirements imposed by Congress in APA § 553. It did not observe the notice and comment procedures mandated by the APA and by the FBSA and its letter was not judicially reviewable. Consequently, the Coast Guard letter cannot be given preemptive effect.[3]

[3] Brunswick suggests that preemption under the express preemption clause of the FBSA, section 4306, does not turn on a "regulation prescribed under section 4302," and that, instead, section 4306 should be "read literally," and apparently without any regard to congressional intent, to provide that "state law is preempted unless it is 'identical to a regulation prescribed by the Coast Guard.'" Opp. 21 n.15. As Brunswick parses the text of section 4306, all state law, including tort law, is preempted by section 4306, and state law is restored only if (1) the Coast Guard prescribes a regulation under section 4302 and (2) state law is then identical to the newly minted federal regulation.

This construction of section 4306 ignores this Court's recent unanimous restatement of the framework for analysis of express preemption provisions. *Travelers Ins. Co.*, 514 U.S. at 654-55. If a statute, like the FBSA, contains an express preemption provision, resolution of preemption issues "begin[s] . . . with the text of the provision in question." *Id.* at 655. Nonetheless, because "pre-emption claims turn on Congress's intent," the Court "move[s] on, as need be, to the structure and purpose of the Act." *Id.* Moreover, this Court addresses an express preemption provision, like other claims of preemption, "with the starting presumption that Congress does not intend to supplant state law." *Id.* at 654.

Brunswick's construction of section 4306 is inconsistent with these principles. Congress enacted the FBSA to improve boating safety. Senate Report, 1971 U.S.C.C.A.N. at 1333. Under Brunswick's reading of section 4306, Congress preempted all state law with respect to recreational vessels and completely freed manufacturers of their duties of care under state tort law even in the absence of any applicable federal safety standard. Brunswick would read the FBSA to create a common law and regulatory void with respect to manufacturing safe recreational vessels and boating equipment until such time, if ever, that the Coast Guard, with limited

A. Federal Regulations That Are "Properly Adopted in Accordance With Statutory Authorization" Have the Force and Effect of Law and Can Preempt State Law Under the Supremacy Clause

The Supremacy Clause of the Constitution provides for preemption of state law by stating that "the

Laws of the United States which shall be made in Pursuance" of the Constitution "shall be the supreme Law of the Land." U.S. Const., art. VI, cl. 2; *see Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 209 (1824); *City of New York v. FCC*, 486 U.S. 57, 63 (1988). Federal regulations, as well as federal statutes, can preempt state law. *See, e.g., Hillsborough County, Fla. v. Automated Med. Labs, Inc.*, 471 U.S. 707, 713 (1985); *Fidelity Federal Savings & Loan Association v. De la Cuesta*, 458 U.S. 141, 153 (1982).

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resources and numerous responsibilities, decides to prescribe a federal safety standard. This void would obviously be inconsistent with Congress' purpose of improving boating safety.

Brunswick's analysis of the preemptive effect of section 4306 would also be inconsistent with two well-settled rules: in the absence of a federal regulation, federal statutes should not be construed to create a regulatory void by preempting state regulation, *see Pacific Gas & Elec. Co. v. State Energy Resources Conserv. & Development Comm'n*, 461 U.S. 190, 207-08 (1983), and state common law remedies are not preempted where federal law provides no comparable or alternative remedy, *see Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984); *United Constr. Workers v. Laburnam Constr. Corp.*, 347 U.S. 656, 663-64 (1954).

Ironically, and somewhat perversely, under Brunswick's reading of section 4306, the States cannot enforce traditional common law duties of care where there is no federal safety standard to protect consumers; the States can only act to protect consumers after the Coast Guard has acted to protect them by prescribing a federal safety standard. Brunswick in effect reads the express preemption clause of the FBSA as if it is a prospective savings clause: all state law is preempted, subject to reinstatement if the Coast Guard issues a regulation and if it is identical to the federal regulation. Of course, the FBSA contains a savings clause, section 4311(g), and Brunswick's construction of the express preemption clause would, contrary to settled principles of statutory construction, reduce the savings clause to mere surplusage.

If they are to have the same preemptive effect as federal statutes, federal regulations must be "properly adopted in accordance with statutory authorization." *City of New York v. FCC*, 486 U.S. at 63 (the Supremacy Clause embraces "both federal statutes themselves and federal regulations that are properly adopted in accordance with statutory authorization"). Such federal regulations can preempt state law because, like federal statutes, they have the "force and effect of law." *Chrysler v. Brown*, 441 U.S. at 295. *See id.* at 295-96.

In order "to have the 'force and effect of law,'" a federal regulation "must have certain substantive characteristics and be the product of certain procedural requisites." *Id.* at 301 (citation omitted). As a substantive matter, a regulation does not have the "force and effect of law" unless the agency has acted within its statutory authority: "[t]he legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes." *Id.* at 302. As a procedural matter, a regulation does not have the "force and effect of law" unless it "conform[s] with any procedural requirements imposed by Congress." *Id.* at 303. "[A]gency discretion is limited not only by substantive, statutory grants of authority, but also by the procedural requirements which 'assure fairness and mature consideration of rules of general application.'" *Id.* (quoting *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969)).

The Coast Guard letter adopting the recommendation of the National Boating Safety Advisory Council

is not a legislative rule because it did not conform with the procedural requirements imposed by Congress in the APA and the FBSA. Consequently, the Coast Guard letter does not have the force and effect of law and cannot preempt state law under the Supremacy Clause.

B. The Coast Guard Did Not Intend for Its Letter To Have the Force and Effect of Law Because It Did Not Comply With the Procedural Requirements Imposed by Congress in the APA

1. *Legislative Rules That Have the Force and Effect of Law Must Be Promulgated Through Notice and Comment Procedures*

The Administrative Procedure Act distinguishes two types of substantive rules: (1) legislative rules, also referred to as "substantive" rules, and (2) interpretive rules (sometimes called "non-legislative" rules) or general statements of policy. *See Lincoln v. Vigil*, 508 U.S. 182, 196 (1993) (distinguishing (1) "so-called 'legislative' or 'substantive' rules" and (2) " 'interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice' ") (*quoting* 5 U.S.C. § 553(b)); *Chrysler v. Brown*, 441 U.S. at 301-02 & n. 31 (distinguishing (1) "a substantive rule—or a 'legislative-type rule' " from (2) "interpretive rules" and "general statements of policy"); *Batterton v. Francis*, 432 U.S. 416, 425 n. 9 (1977) (distinguishing (1) "legislative, or substantive regulations" and (2) "interpretative regulation[s]").[4]

[4] *See generally* Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, And The Like—Should Federal Agencies Use Them To Bind The Public?*, 41 Duke L.J. 1311, 1319-27 (1992); Kenneth C. Davis &

A "legislative" or "substantive" rule is one that " 'affect[s] individual rights and obligations.' " *Chrysler v. Brown*, 441 U.S. at 302 (quoting *Morton v. Ruiz*, 415 U.S. 199, 232, 236 (1974)); *Batterton v. Marshall*, 648 F.2d 694, 701-02 (D.C. Cir. 1980).[5] Legislative or substantive rules, unlike interpretive rules or general statements of policy, may have the same force and effect of law as statutes. *Chrysler v. Brown*, 441 U.S. at 302 & n. 31; *see* Kenneth C. Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* § 6.2, at 228 (3d ed. 1994) ("a valid legislative rule has the same binding effect as a statute; a general statement of policy has no binding effect on members of the public or on courts").

In order to have the binding effect of a statute, a legislative rule must be promulgated under the notice and comment procedures of the APA. *See Chrysler v. Brown*, 441 U.S. at 312-14 (APA's notice and comment procedures apply "in the context of 'legislative' or 'substantive' rulemaking," but interpretive rules and general statements of policy "are exempt from these requirements"); *see also Lincoln v. Vigil*, 508 U.S. at 196 (APA's notice and comment procedures apply to "legislative" or "substantive" rules). As one leading authority has observed:

Richard J. Pierce, Jr., *Administrative Law Treatise* § 6.2, at 228 (3d ed. 1994) (discussing "three main differences between a legislative rule and a general statement of policy"); *id.* § 6.3, at 233 (discussing "four main differences between legislative rules and interpretative rules").

[5] *See also* Anthony, 41 Duke L.J. at 1355 (defining a legislative rule as one that changes substantive law or policy); *id.* at 1355 n. 269 (collecting cases identifying various classes of substantive changes subject to legislative rulemaking requirements).

> The most important category of rules—legislative rules—have the same binding effect as statutes. With specified exceptions, "rules" of this type can be promulgated only through use of procedures set forth in APA § 553—public notice of the proposed rule, receipt and consideration of comments on the proposed rule, and issuance of the final rule incorporating a statement of basis and purpose.

Davis & Pierce § 6.1, at 225. "The essential purpose of according § 553 notice and comment opportunities is to reintroduce public participation and fairness to affected parties after government authority has been delegated to unrepresentative agencies." *Batterton v. Marshall*, 648 F.2d at 703.

The court of appeals erred in holding that the Coast Guard's "position" that it "should take no regulatory action to require propeller guards," Pet. App. 8a-9a, preempts state law. The Coast Guard's position was not adopted under the APA's notice and comment procedures, and it is not a valid legislative rule. The Coast Guard's position is at most a general statement of policy.[6] It does not have the force and effect of law because it was not promulgated under legislative rulemaking procedures and was not subject to judicial review. The Coast Guard's position

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[6] This Court has defined "general statements of policy" as "'statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power.'" *Chrysler v. Brown*, 441 U.S. at 302 n.31 (quoting Attorney General's Manual on the Administrative Procedure Act 30 n.3 (1947)); *see* Anthony, 41 Duke L.J. at 1321-27 (distinguishing and defining legislative rules, interpretive rules, and general statements of policy).

thus does not have the force and effect of law necessary to preempt state law. *See State of Alaska v. U.S. Dept. of Transp.*, 868 F.2d 441, 445 (D.C. Cir. 1989) (agency's legislative rules held invalid and of no preemptive effect because agency failed to employ APA notice and comment procedures).

2. *A Decision Not To Regulate, Like a Decision To Regulate, Requires the Use of Legislative Rulemaking Procedures If It Is To Have the Force and Effect of Law*

The Coast Guard's position that it should take no regulatory action to require propeller guards is not excused from compliance with the APA's notice and comment legislative rulemaking procedures on the ground, suggested by Brunswick, that the agency made a negative decision "*not* to regulate" as opposed to an affirmative decision to regulate propeller guards. Opp. 16. Any agency decision concerning propeller guards—whether to require them or to prohibit them—must, if it is to preempt state law creating "individual rights and obligations," *Chrysler v. Brown*, 441 U.S. at 302 (quoting *Morton v. Ruiz*, 415 U.S. at 232), be made under the notice and comment, legislative rulemaking procedures of the APA, 5 U.S.C. § 553. The Coast Guard did not follow these procedures. Its letter is therefore not a "legislative" or "substantive" rule having the force and effect of law necessary to preempt state law under the Supremacy Clause.

An affirmative decision by the Coast Guard to regulate propeller guards would undoubtedly have to be made under the APA's notice and comment rulemaking procedures in order to preempt state law. The Coast Guard apparently recognizes as much, and has

followed the APA's notice and comment rulemaking procedures in prescribing numerous regulations under section 4302 of the FBSA. *See* 33 C.F.R. Pt. 183 (1997). The Coast Guard, for example, would have to follow the APA's notice and comment rulemaking procedures to prescribe a regulation requiring a particular type of propeller guard or setting performance criteria for propeller guards. Such a regulation would affect individual rights and obligations of boat users like Kathryn Lewis and engine manufacturers like Brunswick. It could prevent States from enacting laws or regulations requiring propeller guards that were not identical to the types of guards required by federal law and, under the court of appeals' reading of the FBSA, it could also preclude liability under state tort law. The court of appeals erred in giving similar preemptive effect to the Coast Guard's position that it should take no regulatory action to require propeller guards, because the agency did not follow the procedures required by the APA.

There is, in short, no difference between affirmative and negative regulatory decisions intended by the agency to affect individual rights and obligations. Both must comply with the APA. If the Coast Guard intended its position that it should take no regulatory action to require propeller guards to have the force and effect of law and preempt state law, then it should have conducted a rulemaking proceeding and issued a final rule, subject to judicial review, to that effect. *See* 5 U.S.C. §§ 704, 706; *see also* Senate Report, 1971 U.S.C.C.A.N. at 1340. Agencies frequently conduct rulemaking proceedings, examine a regulatory problem on the merits, and then decide for substantive reasons not to promulgate a regulation. *See, e.g., Consumer Federation v. Consumer Product Safety Comm'n*, 990 F.2d 1298, 1304-08

(D.C. Cir. 1993) (reviewing an agency decision not to regulate and to terminate a rulemaking proceeding); *Natural Resources Defense Council, Inc. v. SEC*, 606 F.2d 1031, 1047 (D.C. Cir. 1979) (reviewing an agency's failure to issue a rule after conducting a rulemaking proceeding); *see also* Ronald M. Levin, *Understanding Unreviewability In Administrative Law*, 74 Minn. L. Rev. 689, 769-70 & n. 405 (1990) (noting that this Court has recognized for fifty years the reviewability of "negative orders"—decisions not to regulate made after conducting a rulemaking proceeding). This, however, did not occur here.

Brunswick has offered no authority to support its position that affirmative and negative regulatory decisions that have substantial effects on individual rights and obligations should be subject to different procedural requirements under the APA. *See* Opp. 16. Moreover, the distinction proposed by Brunswick, between decisions not to regulate[7] and decisions to

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[7] Brunswick also characterizes the Coast Guard's decision not to regulate as a type of "inaction" that "preempts state law." Opp. 19. It is true, as Brunswick notes, that this Court has stated that "a federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much pre-emptive force as a decision *to* regulate." *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983); *see Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988). This principle, however, has only rarely found application. Indeed, this Court refused to find preemption of state law in the two principal "inaction" cases discussed by *Brunswick*. *See* Opp. 19-20 (citing *Arkansas Elec. Coop. Corp.*, 461 U.S. at 384-85, and *Isla Petroleum Corp.*, 485 U.S. at 503-04).

These inaction cases, and others, are best understood as according preemptive effect to a federal decision not to regu-

regulate, would negate public participation in the rulemaking process and preclude judicial review. Congress, however, intended that regulations prescribed

late some matter (X) where most other matters from A to Z are subject to federal regulation. *See Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Board*, 474 U.S. 409, 422 (1986) (preemption of state regulation of sale of natural gas to an interstate pipeline in context of comprehensive federal statutory regulation of natural gas). "Inaction" may constitute an act of preemption if there is a comprehensive federal regulatory scheme and a federal agency intentionally leaves a gap in the regulated field.

In this case, there is no gap in the Coast Guard's regulation of propeller guards from which a preemptive inference can be drawn. Brunswick's inaction argument would have force if, for example, the Coast Guard announced in a notice of proposed rulemaking its intention to require propeller guards on motor boats ten to thirty feet long and then published a final rule requiring propeller guards on motor boats ten to twenty-five feet long. A preemptive inference could be drawn from the agency's inaction with respect to motor boats twenty-five to thirty feet in length. The inaction cases noted above would support the inference that the Coast Guard did not intend to require propeller guards on this limited group of large motor boats and that state laws and regulations requiring propeller guards on motor boats twenty-five to thirty feet in length were preempted. Nonetheless, as Justice Frankfurter cautioned, courts should be reluctant to draw an inference of preemption from unexercised federal power: "Since Congress can, if it chooses, entirely displace the States to the full extent of the far-reaching Commerce Clause, Congress needs no help from generous judicial implications to achieve the supersession of State authority." *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767, 780 (1947) (Frankfurter, J., dissenting).

under section 4302 of the FBSA be subject to judicial review. *See* Senate Report, 1971 U.S.C.C.A.N. at 1340. If, as Brunswick contends, a decision not to regulate is not subject to the APA's notice and comment procedures, then it would likewise not be subject to judicial review, in contravention of Congress' intent. *See* Anthony, 41 Duke L. J. at 1317-18 n. 25.

The Coast Guard can, of course, have a policy of "tak[ing] no regulatory action to require propeller guards" without observing the APA's notice and comment procedures. If, however, the Coast Guard intends that its position have the binding force and effect of law so as to preempt the rights and obligations of individuals created by state law, then the agency must comply with the legislative rulemaking procedures prescribed by Congress.

C. The Coast Guard Did Not Comply With the Rulemaking Procedures Imposed by Congress in the Federal Boat Safety Act for Prescribing Regulations That Preempt State Law

Congress specifically intended that the Coast Guard observe the notice and comment procedures of the APA in prescribing regulations under the FBSA. *See* Senate Report, 1971 U.S.C.C.A.N. at 1340. Congress also imposed an additional procedural requirement on the Coast Guard: consultation with the National Boating Safety Advisory Council (NBSAC).[8] The Coast Guard, in promulgating regulations, has recog-

[8] Congress can add procedural requirements to the notice and comment procedures prescribed in the APA, and many statutes impose the additional requirement of consultation with an advisory council. Davis & Pierce § 7.7; Bernard Schwartz, *Administrative Law* § 4.10, at 189-90 (1991).

nized that consultation with the NBSAC is an addition to, and not an alternative to, compliance with the APA. For example, when the Coast Guard proposed a rule on start-in gear protection devices, it published in the Federal Register a notice of proposed rulemaking. 45 Fed. Reg. 18987 (1980). This notice reported that the Coast Guard had consulted with the NBSAC and that both the transcript of the NBSAC's discussion of the proposed rule and the minutes of the NBSAC meeting were available for examination. *Id.* The Coast Guard, in compliance with the APA, invited "[i]nterested persons . . . to participate in this proposed rulemaking." *Id.* Moreover, in promulgating its final rule, the Coast Guard responded to significant comments, *see* 46 Fed. Reg. at 3515 (1981), and its final rule was subject to judicial review. *See* 5 U.S.C. §§ 704, 706.

In adopting its position on propeller guards, the Coast Guard did not use the procedures that are necessary to give its position the force and effect of law. The agency did not initiate notice and comment rulemaking under the APA, and its letter was not subject to judicial review. The Coast Guard's position is obviously not the equivalent of a "regulation prescribed under section 4302" of the FBSA. It thus does not preempt state law because the agency did not "conform with [the] procedural requirements imposed by Congress." *Chrysler v. Brown*, 441 U.S. at 303; *see also Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) ("a federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority").

D. The Coast Guard Letter Adopting the National Boating Safety Advisory Council's Recommendation Does Not Preempt State Law Because It Does Not Have the Binding Force and Effect of Law

The Coast Guard did not comply with the notice and comment procedures imposed by Congress in the APA and in the FBSA: its position on propeller guards is not a valid rule under the APA, and it is not a "regulation prescribed under section 4302" of the FBSA. In consequence, the Coast Guard letter adopting the recommendation of the NBSAC does not have the "force and effect of law" because it does not "conform with [the] procedural requirements imposed by Congress." *Chrysler v. Brown*, 441 U.S. at 302-03.

Unlike other courts of appeals, the court below failed to recognize that the Coast Guard letter cannot preempt state law because it does not have the force and effect of law. *See Wabash Valley Power Ass'n, Inc. v. Rural Electrification Admin.*, 903 F.2d 445, 453-54 (7th Cir. 1990) (an agency official's letter does not have the force and effect of law because it was not adopted after notice and comment). *See also Thomas v. New York*, 802 F.2d 1443, 1446-48 (D.C. Cir. 1986) (Scalia, J.) (an administrator's letter is not binding because it was not issued after notice and comment and was not published in the Federal Register), *cert. denied*, 482 U.S. 919 (1987). *Cf. Barclays Bank PLC v. Franchise Tax Board of California*, 512 U.S. 298, 329-30 (1994) ("Executive Branch communications that express federal policy but lack the force of law" cannot preempt state law). Judge Easterbrook observed in 1990 that no "case hold[s] that a federal agency may preempt state law without either rulemaking or adjudication." *Wabash Valley Power*, 903 F.2d at 454.

Brunswick suggests that the "extensive fact-finding activities" of the Propeller Guard Subcommittee and the decisions of the NBSAC and the Coast Guard to accept the subcommittee's recommendations are the equivalent of rulemaking under the APA. Opp. 4-7, 16. Consultation with the advisory council, however, is an additional procedural requirement for rulemaking imposed by Congress in the FBSA; it is not a substitute for the APA's notice and comment procedures. More important, this Court has already rejected Brunswick's suggestion and held that "regulations subject to the APA cannot be afforded the 'force and effect of law' if not promulgated pursuant to the statutory procedural minimum found in that Act." *Chrysler v. Brown*, 441 U.S. at 313. Courts cannot excuse the "lack of strict compliance with the APA," *id.* at 312, because this Act "is a formula upon which opposing social and political forces have come to rest." *Id.* at 313. The courts "are charged with maintaining [that] balance [by] ensuring that agencies comply with the 'outline of minimum essential rights and procedures' set out in the APA." *Id.* (citations omitted).

* * * *

This Court has repeatedly held that the historic police powers of the States are not preempted "unless that was the clear and manifest purpose of Congress." *See, e.g., Travelers*, 514 U.S. at 645 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Where Congress has granted federal agencies the weighty power to preempt state law, it is essential that agencies be required to exercise this power in a politically accountable manner. *See* Davis & Pierce § 6.7, at 262 (notice and comment rulemaking enables public to express concerns to President and members of Con-

gress, who, in turn, can "express to the agency their views concerning the proposed policy decision and, through the process of Executive and congressional oversight, . . . affect agency resolutions of policy disputes"). The Court should reaffirm the fundamental rule of law that a federal agency cannot preempt state law unless it complies with the notice and comment rulemaking procedures of the APA.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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